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No. 79-1946

IN THE

Supreme Court of the United States

October Term, 1979

JAMES MORAN,

Petitioner,

v.

GOULD INCORPORATED and the
NATIONAL LABOR RELATIONS BOARD,

Respondents.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Third Circuit.

BRIEF FOR RESPONDENT GOULD INCORPORATED IN OPPOSITION

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QUESTION PRESENTED

Was there a reasonable basis for the Court of Appeals to conclude that Petitioner's discharge did not violate Section 8(a)(4) of the National Labor Relations Act?

STATEMENT OF THE CASE

James Moran, the petitioner in this case, was discharged by Respondent Gould Incorporated ("Gould" or "the Company") on October 18, 1976 for his leadership of and participation in a wildcat work stoppage in violation of a valid no-strike clause in his union's contract with Gould. Moran was the union shop steward on his shift, and on October 13, 1976, he led approximately 50 employees in a two-hour stoppage of work. Contrary to the suggestion in the Petition for Certiorari, there was no doubt in any of the tribunals below that the strike violated the no-strike clause of his contract[1] or that Moran participated in it.[2] Indeed, the question of Moran's active participation in and encouragement of the work stoppage was the subject of sharply conflicting testimony below. The Administrative Law Judge ("ALJ") found the testimony of Company personnel on these matters "trustworthy" and explicitly rejected Moran's contrary testimony (and the factual scenario set forth in the Petition for Certiorari). The Board adopted the ALJ's findings.

As the union shop steward, Moran had specific obligations under the contract to take action to halt any

1. The dispute underlying the stoppage had been submitted to the grievance process. Moran led the employees in a wildcat strike without waiting for the Company's answer, which was not yet due under the grievance system.

2. The Administrative Law Judge, the Board, and the Court of Appeals so found. In fact, Gould contended on appeal that the record compelled the conclusion that Moran not only participated in but led the work stoppage. The Company's testimony, which was credited over Moran's by the Administrative Law Judge, demonstrated that Moran stood at his foreman's side and exhorted the employees to continue the stoppage while his foreman entreated the strikers to return to work. Two members of the National Labor Relations Board agreed with this conclusion. The Court of Appeals did not reach the issue.

wildcat strikes. He disregarded these obligations as well as his obligations under the no-strike clause when he actively participated in the stoppage. Nonetheless, the Board held that Gould violated Section 8(a)(3) of the National Labor Relations Act, 29 U. S. C. § 158(a)(3), in discharging Moran for his actions in connection with that work stoppage. Specifically, the ALJ, whose finding the Board adopted, wrote:

> "I find that [Moran] was selected for discharge because he willfully failed the responsibility of his union position [in connection with the stoppage] . . . ."

It was this finding and the Board's ruling as to its legal effect which was the main thrust of the decisions below.

With its decision in this case, the Third Circuit Court of Appeals joined the Seventh Circuit in rejecting the Board's notion (which ran contrary to years of Board and arbitrators' decisions) that it violates the National Labor Relations Act to single out for discharge a shop steward who violates a no-strike clause. *Neither Moran nor the NLRB has sought review of that decision.* This Petition for Certiorari is instead founded on an afterthought of the ALJ and the Board. In the final sentence of his opinion, the ALJ added that the decision to discharge Moran had been "affected or motivated, in part, by the fact that he filed charges with, or complained to EEOC and OSHA, and also because he had filed a charge with the NLRB." Accordingly, the ALJ concluded that Gould had violated § 8(a)(4) of the National Labor Relations Act, § 29 U. S. C. § 158(a)(4), which forbids discharge in retaliation for filing charges under the National Labor Relations Act.

The Court of Appeals reviewed the extensive record before it and concluded that substantial evidence on the

record as a whole did not support a violation of § 8(a)(4). Indeed, it as well as the Board itself found that Moran was discharged because he violated his responsibilities under his contract in connection with the wildcat strike. The additional, implicitly contradictory conclusion by the Board referred to charges which Moran had filed well over a year before the strike and his discharge.

The stated basis for the ALJ's conclusion that Gould had fired Moran as retaliation was an internal Company "Progress Report" written at the time of the discharge. But neither the Progress Report nor any of the internal documents prepared in connection with the discharge contained any mention of Moran's previous filing of charges. The only reference ever made by the Company to those previous charges had been in a letter written by Gould to the union in February of 1976, over seven months before the strike and Moran's discharge. From the record, it is clear that the letter and the charges had no part in the decision to discharge Moran, and in concluding the contrary, the Board ignored the *uncontradicted* evidence in the record as to how the letter came to be mentioned at all at the fourth step of the grievance procedure.

The Third Circuit reviewed all the evidence and the credibility determinations (none of which was resolved against the Company), and reversed the conclusion of the Board, stating: "From our review of the entire record we conclude that there is no substantial evidence to support a finding that Moran's discharge was because he had filed charges with EEOC, OSHA, and the Board."

SUMMARY OF ARGUMENT

The Court of Appeals has the primary responsibility for reviewing the record as a whole to determine whether substantial evidence supports the Board's findings. This Court need intervene only in the rare instance where the Court of Appeals misapprehends or grossly misapplies the standard. This is plainly not such a case. Not only did the Board itself find another, non-retaliatory motive as the real reason for the discharge, the entire record clearly demonstrated that retaliation was not the real motive for the discharge.

ARGUMENT

I. The Court of Appeals' Determination Concerning the Existence of Substantial Evidence on the Record as a Whole Should Be Disturbed Only Where the Standard Has Been Misapprehended or Grossly Misapplied.

As originally enacted, the National Labor Relations Act provided that the Board's findings of fact would be conclusive if "supported by evidence." Pub. L. No. 198, § 10(f), 49 Stat. 455 (1935). Intending to provide a more genuinely meaningful review of the Board's findings, the Congress changed the standard in 1947; the relevant section now provides that "the findings of the Board with respect to questions of fact if supported by substantial evidence on the record considered as a whole shall . . . be conclusive." 29 U. S. C. § 160(f); Pub. L. No. 101, § 10(f), 61 Stat. 140 (1947). On appeal, a Court of Appeals must examine the record as a whole to determine the validity of the Board's findings. This more stringent standard of review was construed by this Court in *Universal Camera Corp. v. NLRB,* 340 U. S. 474, 488 (1951), when it held:

> [A] reviewing court is not barred from setting aside a Board decision when it cannot conscientiously find that the evidence supporting that decision is substantial, when viewed in the light that the record in its entirety furnishes, including the body of evidence opposed to the Board's view.

As Mr. Justice Frankfurter admonished, a court is not to "deem itself merely the judicial echo of the Board's conclusion." *Universal Camera Corp. v. NLRB,* 340 U. S. 474, 491 (1951).

In the *Universal Camera* case, this Court also held that the determination

> [w]hether on the record as a whole there is substantial evidence to support agency findings is a question which Congress has placed in the keeping of the Court of Appeals. This Court will intervene only in what ought to be the rare instance when the standard appears to have been misapprehended or grossly misapplied. 340 U. S. at 491.

That deference to the Court of Appeals' review of the entire record has been repeatedly reaffirmed by this Court. *See, e.g., Golden State Bottling Company v. National Labor Relations Board,* 414 U. S. 168, 172-3 (1973); *Central Hardware Co. v. National Labor Relations Board,* 407 U. S. 539, 548 (1972).[3] As Mr. Justice Brennan wrote in *Golden State,* "This is not the place . . . to reverse a Court of Appeals because were we in its place we would find the record tilting one way rather than the other. . . ." *Golden State, supra,* 414 U. S. at 174, quoting *NLRB v. Pittsburgh Steamship Company,* 340 U. S. 498, 503 (1951).

II. The Court of Appeals Had Ample Basis to Conclude That the Board's Subsidiary Finding Concerning the Cause of Moran's Discharge Was Unsupported by Substantial Evidence.

Even a brief perusal of the circumstances of this case makes it clear that the Court of Appeals correctly found that there was no substantial evidence to support the

3. In *Central Hardware, supra,* cited by Petitioner, no such determination had been made by the Court of Appeals, and the Court remanded the case to the Court of Appeals with the instructions to undertake such a review. On remand, the Court of Appeals determined that there was not substantial evidence to support the Board's findings. 468 F. 2d 252 (8th Cir. 1972).

Board's conclusion that Moran was discharged in retaliation for filing charges. This is hardly that "rare instance" where a Court of Appeals went grossly astray. After all, the entire thrust of the Board's decision was that Moran was discharged *because of his participation in the wildcat strike.*

The Company's position at the time of the discharge was completely consistent—Moran was discharged for violating the no-strike provision of the contract. The many documents created in connection with the decision to discharge and made part of the record below *all* gave the no-strike clause violation as the reason for the discharge. The scenario surrounding the discharge decision was described in detail by the various witnesses for the Company, and was not contradicted at the hearing to any substantial extent. Further, the author of the "Progress Report" described in detail and without contradiction what the language in that report meant. Neither that testimony nor the Progress Report nor any of the documents relating to the discharge referred to the filing of charges by Moran. In short, there was *no* evidence that previous complaints to government agencies had anything to do with the decision to discharge Moran.

The sole basis on which the Petition for Certiorari rests is the February 18, 1976 letter to the Union, which among other things refers to Moran's complaints to government agencies. This letter was referred to in a session with the Union to discuss its grievance over Moran's discharge.

But to connect the contents of the letter with the discharge in any way requires that one ignore not only what the letter says and the obvious lack of connection to the Progress Report on which the Board relied, but also that one ignore the *uncontradicted* testimony as to how the February 18 letter came to be part of the record at all.

The February 18 letter had recounted Moran's participation in a 1973 work stoppage, Moran's repeated filing of placement grievances at the wrong level in violation of Company policy, and Moran's various complaints to federal agencies. Panciera of Gould testified that during the fourth step grievance meeting the question of mitigation of the discipline was raised, and that Gould responded that it would not because this was the second illegal work stoppage that Moran had been active in and involved with. He read from the February letter regarding the 1973 stoppage because it was the only written record of that stoppage. The reference to the 1973 stoppage was the first item in the letter, and Panciera read only that portion to support the Company's position. The *union* then asked him to read the balance of the letter and to attach it to the minutes. It is important to recognize that Panciera's testimony was uncontradicted in this regard, although union officers who attended the meeting testified at the hearing.

Finally, it is important to understand what the February letter itself did and did not do. The letter did not in any way threaten retaliation for filing such charges, nor was it made part of Moran's personnel file. The Company and the union had previously set up informal contract mechanisms for dealing with equal opportunity and occupational safety and health disputes, in addition to the normal grievance process. The part of the letter referring to those charges was an understandable attempt to ask Moran, who had as a shop steward been ignoring the mechanisms, to avail himself of them. In fact, the letter specifically pointed out that *"His rights to take such individual actions, as an employee, are not in question."*

This Court has long held that when the issue is improper motive for a discharge, it is the "real motive" which is important. *See, e.g., Associated Press v. NLRB,* 301

U. S. 103, 132 (1937); *NLRB v. Brown,* 380 U. S. 278 (1965). Beyond its first finding of motive, the Board inferred another motive of retaliation by an extraordinarily attenuated chain of reasoning. It relied on a recitation to charges made long after the Progress Report which was the stated basis for its finding. That recitation itself arose only because the union asked Gould to read the remainder of a letter written ten months before the discharge. And the letter containing the reference to the charges neither threatened retaliation nor questioned Moran's rights to take such actions as an employee. The real reason for Moran's discharge as found by the Court of Appeals was absolutely clear from the record as a whole: Moran was discharged because he led a wildcat work stoppage on October 13, 1976, and for no other reason.

CONCLUSION.

For all of the above reasons, the Petition for a Writ of Certiorari to the Court of Appeals for the Third Circuit should be denied.

Respectfully submitted,

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